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MAY, 2007 • \$10.00 • WWW.CTLAWTRIBUNE.COM

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EXPERTS OBTAIN COURTS' BLESSINGS

Recent rulings: expert witnesses need not have mirror-image credentials as defendant doctors

By **ELLIOTT B. POLLACK**

Determination of the standard of medical care in malpractice, physician discipline and managed care reimbursement proceedings is critical. Typically, expert testimony is necessary. What credentials are sufficient to entitle a proffered witness to testify as an expert?

The determination often can be straightforward. For example, a pediatrician who offers to testify about the proper standard of care in a case involving the diagnosis and treatment of pediatric Lyme Disease should not be allowed to testify if she knows nothing about the disease and has never diagnosed or treated her patients for that condition even though she is a pediatrician.

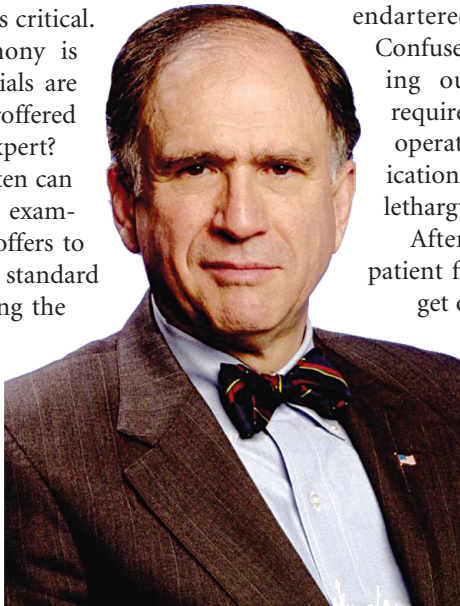
The issues become more complex with a physician who possesses significant knowledge about a given practice area but who is not credentialed identically or even similarly to the individual whose care is being challenged.

A pair of March decisions, one in New York and the other by Connecticut Superior Court Judge Gerard F. Esposito in the Judicial District of Ansonia, highlight the inquiry nicely.

Related Expertise

In the Connecticut ruling, the estate of

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Lawrence Manende brought a malpractice action against Griffin Hospital and the vascular surgeon who cared for the decedent. Before his death, Manende had been admitted to the hospital for a carotid endarterectomy in 2002.

Confused and prone to climbing out of bed, Manende required restraints. Before the operation, he received medication that tended to cause lethargy and confusion.

After the surgery, the patient fell while attempting to get out of bed and suffered a fractured hip. He had to undergo a curative procedure. The parade of horrors ended with the patient's death two weeks after he was admitted to the hospital. The attending physician was

charged with failing to see to it that Manende was properly cared for and restrained and that his medication was properly monitored.

The plaintiff disclosed as its medical expert a physician who was board certified in cardiology and internal medicine. The defendants sought summary judgment because the disclosed expert was not a "similar health care provider" as provided in the applicable statute. How could the proffered expert who had "never performed the operation undergone by Manende and [who had] never written post-operative orders for such surgery," hold the necessary training, experience and knowledge in vascular surgery to qualify as an expert, the defendants asked.

Judge Esposito agreed with the assertion that the cardiologist could not speak to the appropriate standard of care for a vascular surgeon. He pointedly noted that the defendant-physician did "not step out of his shoes as a vascular surgeon the moment he [put] down the knife."

Since the expert was certified only in internal medicine and cardiology, he did not meet the "similar health care provider" statutory predicate.

That was not the end of the inquiry, however.

Another section of the Connecticut statute authorizes expert testimony if, "as a result of practice or teaching in a related field of medicine," the court concludes that the proffered expert "possesses sufficient training, experience and knowledge ... so as to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine."

The Appellate Court's benchmark decision in *Friedman v. Meriden Orthopedic Group* and several Superior Court decisions convinced Judge Esposito to hold that, while not certified as a vascular surgeon, the proffered expert occupied a field "related to" the expertise of the defendant-physician.

Tellingly, the expert demonstrated a knowledge of post-operative care by testifying that he had "monitored and attended to many patients having undergone the same surgery as the plaintiff ..."

New To Medicine

A trial-level decision released by a New York State Supreme Court justice 11 days before Judge Esposito's ruling in *Manende* came out exactly the same way.

Moshe Assaf brought a malpractice suit against his cardiothoracic surgeon and a

number of other professionals at New York Presbyterian Hospital following his 2001 coronary artery bypass graft surgery. Here, as in *Manende*, a major issue was whether there were serious deficiencies in his post-operative care.

The expert put forth by Assaf was a very recent medical school graduate, not yet board certified, who was licensed to practice in New York three years after the surgery in question; she completed her three-year internal medicine residency in June 2006.

As in *Manende*, the defense asserted that the plaintiff's expert could not testify because she was not a specialist in the same field and, moreover, was still in medical

school when the alleged negligence occurred.

The plaintiff responded that most of his proposed expert's rotations during her residency took place in the intensive care and cardiac care units at Jacobi-Einstein Medical Center "where she was often Unit Chief."

As to the fact that she had only recently commenced medical practice, the court noted that, by dint of her training, she had fresh experience in the very area of medical care at issue. Moreover, her qualifications demonstrated a strong "conversance with the medical issues" presented.

As to the issue dealt with by Judge Esposito in Connecticut, the New York

court concurred. The proposed expert's certification in internal medicine, not in cardiovascular surgery, was not determinative. "A doctor does not need to be a specialist in a particular field to be considered a medical expert," it ruled.

As these decisions show, witnesses seeking to qualify as experts in civil actions where the standard of medical care is at issue need not possess qualifications which are carbon copies of the professionals whose actions are being challenged.

While patients often wonder why medicine has become so sub-specialized and why they get ping-ponged around for care so frequently, the courts find it easier to take a broader view in the litigation context. ■